No. SC83933

IN THE

SUPREME COURT OF MISSOURI

STATE EX REL. FORD MOTOR COMPANY,

Relator,

-vs-

THE HONORABLE EDITH L. MESSINA, JUDGE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI,

Respondent.

RELATOR'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION

CASES

RULES OF CIVIL PROCEDURE

JOURNAL ARTICLES

JURISDICTIONAL STATEMENT

This writ is before the Court on Relator Ford Motor Company=s Petition for Prohibition and/or Mandamus to prevent The Honorable Edith L. Messina, Judge of the Circuit Court of Jackson County, from implementing her Order denying Relator=s Motion for Protective Order and/or Motion to Quash a deposition notice of Relator=s CEO and other high-ranking officials, and denying Relator=s Motion for Reconsideration. Jurisdiction is proper in this Court pursuant to Article V, Section 3, of the Missouri Constitution because Relator alleges Respondent abused her discretion and exceeded her jurisdiction by denying Relator=s Motion for Protective Order and/or Motion to Quash a deposition notice of Relator=s CEO and other high-ranking officials, and by denying Relator=s Motion for Reconsideration, and because Respondent=s Orders exceeded the scope of Rule 56.01 of the Missouri Rules of Civil Procedure.

STATEMENT OF FACTS

Plaintiffs filed this products liability lawsuit on December 22, 1999, arising from an automobile accident occurring on I-35 near Marietta, Oklahoma. (Plaintiffs= Suggestions in Opposition to Defendant Ford Motor Company=s Motion for Protective Order and/or Motion to Quash, p. 1, attached as Exhibit G to Ford=s Petition for Writ of Prohibition and/or Mandamus). Plaintiffs seek unspecific compensatory and punitive damages for the injuries sustained by minors Jesse Church and Shon Aaron Church. The subject vehicle is a 1987 Ford Bronco II equipped with tires manufactured by defendant Continental General Tire, Inc. (Plaintiffs= Suggestions in Opposition to Defendant Ford Motor Company=s Motion for Protective Order and/or Motion to Quash, p. 1, attached as Exhibit G to Ford=s Petition for Writ of Prohibition and/or Mandamus).

Plaintiffs filed a deposition notice seeking the depositions of Jaques Nasser, President and CEO of Ford Motor Company; Tom Baughman, Executive Director-Trucks; Ernest Grush, Corporate Technical Specialist-Environmental & Safety Engineering; and John Rintamaki, Vice-President-Chief of Staff. (Plaintiffs= Notice to Take Videotaped Depositions, attached as Exhibit A to Ford=s Petition for Writ of Prohibition and/or Mandamus). Plaintiffs sought these depositions to discuss differences perceived to exist between the current Firestone/ Ford Explorer litigation and perceived Aproblems@ 15 years ago with Continental tires on Ford Bronco II vehicles. (Letter from plaintiffs= counsel to Doug Robinson, counsel for Ford, attached as Exhibit C to Ford=s Petition for Writ of Prohibition and/or Mandamus) (the AFirestone issue@).

Plaintiffs never sought any written discovery on the Firestone issue. Respondent heard evidence that plaintiffs have not taken any depositions of Ford employees or a corporate representative on the Firestone issue. (Transcript of hearing on Ford=s Motion for Protective Order and/or Motion to Quash, p. 30-1, attached as Exhibit I to Ford=s Petition for Writ of Prohibition and/or Mandamus).

Mr. Nasser was not involved in Ford=s North American operations when the Bronco II was manufactured. (Affidavit of Jacques Nasser, attached as Exhibit B to Exhibit E to Ford=s Petition for Writ of Prohibition and/or Mandamus). Messrs. Nasser, Baughman, and Rintamaki filed affidavits stating they have no personal knowledge of the conduct, actions, or events at issue in this lawsuit. (Affidavits of Messrs. Nasser (Exhibit B to Exhibit E) Baughman (Exhibit F), and Rintamaki (Exhibit F) are attached to Ford=s Petition for Writ of Prohibition and/or Mandamus).

Ford filed a Motion for Protective Order and/or Motion to Quash requesting that plaintiffs= deposition request not be had and/or and order staying and quashing these depositions. (Attached as Exhibit D and E to Ford=s Petition for Writ of Prohibition and/or Mandamus).

Respondent=s first Order entered on August 3, 2001, denied Ford=s Motion for Protective Order and/or Motion to Quash and purportedly required Ford to produce its Aapex@ employees. (Attached as Exhibit H to Ford=s Petition for Writ of Prohibition and/or Mandamus). On the same day, Ford filed a Motion for Reconsideration with new information and requested an expedited hearing. (Attached as Exhibit J to Ford=s Petition

for Writ of Prohibition and/or Mandamus). On August 6, 2001, plaintiffs filed Suggestions in Opposition to Ford=s Motion for Reconsideration. (Attached as Exhibit K to Ford=s Petition for Writ of Prohibition and/or Mandamus). On August 7, 2001, Ford filed a Reply to Plaintiffs= Suggestions in Opposition to Ford=s Motion for Reconsideration.[1] (Attached as Exhibit L to Ford=s Petition for Writ of Prohibition and/or Mandamus). On August 17, 2001, plaintiffs filed Supplemental Suggestions in Opposition to Ford=s Motion for Reconsideration. (Attached as Exhibit M to Ford=s Petition for Writ of Prohibition and/or Mandamus). On August 17, 2001, Respondent issued an Order denying Ford=s Motion for Reconsideration without a hearing. (Attached as Exhibit N to Ford=s Petition for Writ of Prohibition and/or Mandamus).

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1. Ford offered to produce Ernest Grush, Corporate Technical Specialist - Environmental & Safety Engineering, for deposition on September 13, 2001, at 9:00 a.m. on the Firestone issue, in Ford=s Reply to plaintiffs= Suggestions in Opposition to Ford=s Motion for Reconsideration. Mr. Grush was requested in plaintiffs= original Deposition Notice.

On Friday, August 17, 2001, Ford filed a Petition for Writ of Prohibition and/or Mandamus with the Missouri Court of Appeals, Western District. (Attached as Exhibit O to Ford=s Petition for Writ of Prohibition and/or Mandamus). On August 27, 2001, Counsel for plaintiffs filed Joint Suggestions of Respondent and Plaintiffs in Opposition to Petition for a Writ of Prohibition and/or Mandamus. (Attached as Exhibit P to Ford=s Petition for Writ of Prohibition and/or Mandamus). On September 7, 2001, the Missouri Court of Appeals, Western District, entered its Order denying Ford=s Petition for Writ of Prohibition and/or Mandamus. (Attached as Exhibit Q to Ford=s Petition for Writ of Prohibition and/or Mandamus).

On September 10, 2001, Ford filed a Petition for Writ of Prohibition and/or Mandamus with the Missouri Supreme Court. On September 25, 2001, the Missouri Supreme Court granted a Preliminary Writ in Prohibition.

POINTS RELIED ON

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR=S MOTION FOR PROTECTIVE ORDER AND/OR MOTION TO QUASH THE DEPOSITION NOTICE OF RELATOR=S CEO AND OTHER HIGH-RANKING OFFICIALS AND DENYING RELATOR=S MOTION FOR RECONSIDERATION, BECAUSE RESPONDENT ABUSED HER DISCRETION, IN THAT RESPONDENT ALLOWED DISCOVERY BEYOND THE SCOPE OF RULE 56.01, AND RESPONDENT DID NOT REQUIRE PLAINTIFFS TO FIRST ATTEMPT TO OBTAIN THE FIRESTONE INFORMATION THROUGH LESS BURDENSOME MEANS, AND THE RECORD INDICATED THE AAPEX@ EMPLOYEES HAVE NO SUPERIOR OR UNIQUE KNOWLEDGE ON THE FIRESTONE ISSUE.

Binkley v. Palmer, 10 S.W.3d 166 (Mo. Ct. App. 1999)

Fogelbach v. Dir. of Revenue, 731 S.W.2d 512 (Mo. Ct. App. 1987)

In re Daisy Mfg. Co., 17 S.W.3d 654 (Tex. 2000)

Crown Cent. Petroleum Corp. v. Garcia, 904 S.W.2d 125 (Tex. 1995)

Mo. R. Civ. P. 56.01

Mo. R. Civ. P. 57.03

ARGUMENT

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR=S MOTION FOR PROTECTIVE ORDER AND/OR MOTION TO QUASH THE DEPOSITION NOTICE OF RELATOR=S CEO AND OTHER HIGH-RANKING OFFICIALS AND DENYING RELATOR=S MOTION FOR RECONSIDERATION, BECAUSE RESPONDENT ABUSED HER DISCRETION, IN THAT RESPONDENT ALLOWED DISCOVERY BEYOND THE SCOPE OF RULE 56.01, AND RESPONDENT DID NOT REQUIRE PLAINTIFFS TO FIRST ATTEMPT TO OBTAIN THE FIRESTONE INFORMATION THROUGH LESS BURDENSOME MEANS, AND THE RECORD INDICATED THE AAPEX@ EMPLOYEES HAVE NO SUPERIOR OR UNIQUE KNOWLEDGE ON THE FIRESTONE ISSUE.

A. Standard of Review

Prohibition is the proper remedy when a trial court abuses its discretion or exceeds its jurisdiction in making orders in discovery proceedings. State ex. rel. Tennill v. Roper, 965 S.W.2d 945, 947 (Mo. Ct. App. 1998); State ex. rel. State Bd. of Pharmacy v. Otto, 866 S.W.2d 480, 485 (Mo. Ct. App. 1993); State ex. rel. Pierson v. Smith, 838 S.W.2d 490, 493 (Mo. Ct. App. 1992); State ex. rel. Upjohn Co. v. Dalton, 829 S.W.2d 83, 85 (Mo. Ct. App. 1992).

B. Missouri law on Aapex@ depositions

Respondent=s August 3, 2001, Order and August 17, 2001, Order violated Rule 56.01. Rule 56.01 imposes limitations as to the scope and burden that can be imposed on the party from whom the information is being sought. See, e.g., State ex. rel. Ferrellgas L.P. v. Williamson, 24 S.W.3d 171, 184 (Mo. Ct. App. 2000); State ex. rel. Wilson v. Davis, 979 S.W.2d 253, 257 (Mo. Ct. App. 1998) (noting the trial court=s preferred response to overbroad and irrelevant discovery is an order limiting the scope of discovery to certain matters). The discovery authorized by Respondent=s orders fall outside the boundaries of Rule 56.01 because it requires Ford to produce Aapex@ employees for deposition without first requiring plaintiffs to attempt to obtain the Firestone information through less burdensome means, and there is no evidence in the record establishing that less-intrusive methods are unsatisfactory, insufficient, or inadequate.

This Court has not adopted a framework for resolving the issue of when high-level corporate executive officers can be deposed. However, Missouri courts have recognized that limits exist to deposition requests. These limits are consistent with the framework recognized by other courts. This Court should establish a similar framework for dealing with requests for depositions of Aapex@ employees.

In Fogelbach v. Dir. of Revenue, 731 S.W.2d 512 (Mo. Ct. App. 1987), the Missouri appellate court recognized the inherent difficulty of producing officers of an organization. A licensee noticed the deposition of the Director of the Department of Revenue. Fogelbach, 731 S.W.2d at 513. The Director failed to appear, and the trial judge

sanctioned the Department of Revenue by striking its pleadings. Id. The appellate court reversed the sanction and stated: A[i]f we were to allow licensees to depose the director of revenue personally, the director would be required to appear at innumerable depositions in all parts of the state, and when there he would most likely be unable to provide specifics of any particular case.@ Id. The appellate court reversed the trial judge and remanded the case back to the circuit court. Id.

In Binkley v. Palmer, 10 S.W.3d 166 (Mo. Ct. App. 1999), plaintiffs= appealed summary judgment regarding the failure of a development to establish a resort and golf course at the Lake of the Ozarks. Binkley v. Palmer, 10 S.W.3d at 167. Plaintiffs filed suit against Arnold Palmer, his golf course design company, and his golf course management company. Id. The appellate court upheld the denial of plaintiffs= request to take Arnold Palmer=s deposition despite his status as a party defendant. Id. at 173. The Court noted that plaintiffs took the depositions of Anumerous other individuals@ and there is no indication that Arnold Palmer would contradict the testimony of these individuals. Id.

These cases recognize the inherent undue burden and unfair prejudice of requiring depositions of Aapex@ employees who have no superior knowledge of the subject matter for which discovery is sought. Fogelbach embraced the necessity of less intrusive means of discovering requested information because Aapex@ employees would be required to appear at innumerable depositions and would likely be unable to provide specific information about any particular case. Binkley recognized Aapex@ employees often do not have superior or unique knowledge on the requested issue. Both cases implicitly recognize

the severe economic and organizational ramifications of requiring high-level officials to attend depositions in cases where it is clear the CEO or high-ranking officer has no unique or superior knowledge of the subject matter at issue. It is not difficult to imagine how such a discovery tool could be used to force a large manufacturer like Ford Motor Company to risk court sanctions or disruption of its business for depositions in the numerous products liability lawsuits currently filed against it.

Fogelbach and Binkley are consistent with the holdings of courts throughout the country that have routinely required plaintiffs to utilize less intrusive means of obtaining the requested information and required a showing that the Aapex@ employee has superior or unique knowledge of the requested information. See Crown Cent. Petroleum Corp. v. Garcia, 904 S.W.2d 125 (Tex. 1995); Liberty Mut. Ins. Co. v. Superior Court, 10 Cal. App. 4th 1282 (Cal. Ct. App. 1992); Thomas v. Int=l Bus. Mach., 48 F.3d 478, 482 (10th Cir. 1995).

This Court should follow the Supreme Court of Texas and every other court that has looked at this issue and adopt a framework requiring the party seeking the deposition of an Aapex@ employee to attempt to obtain the discovery through less intrusive means and demonstrate that the Aapex@ employee has unique or superior knowledge of discoverable information. See In re Daisy Mfg. Co., 17 S.W. 654, 656-657 (Tex. 2000). The discovering party should then be required to make Aa good faith effort to obtain the discovery through less intrusive methods@ and show (1) the Aapex@ employee=s deposition is reasonably calculated to lead to the discovery of admissible evidence; and (2) the less-intrusive methods

are Aunsatisfactory, insufficient or inadequate.@ Id. (citing Crown Cent. Petroleum Corp. v. Garcia, 904 S.W.2d 125, 128 (Tex. 1995)).

This framework is consistent with current Missouri law. Ford respectfully states Respondent=s orders at issue went beyond the scope of Rule 56.01 by failing to follow the implicit requirements for discovery other courts have explicitly articulated. Therefore, this Court should make its preliminary writ peremptory and require Respondent to vacate her previous orders denying Relator=s Motion for Protective Order and/or Motion to Quash.

C. Plaintiffs= deposition notice seeks irrelevant information regarding the current Firestone/ Ford Explorer litigation

Plaintiffs filed this product liability lawsuit arising from an automobile accident in a 1987 Ford Bronco II equipped with tires manufactured by Continental General Tire Co. Plaintiffs allege defects in the 1987 Ford Bronco II and the tires manufactured by Continental General Tire Co. Plaintiffs make no allegations regarding Ford Explorers or Firestone tires.

The subject matter of plaintiffs= deposition notices clearly exceeds the scope of Rule 56.01. Plaintiffs noticed depositions of four high-ranking officials at Ford Motor Company to discuss the differences perceived to exist between the Firestone tire situation and an alleged Aproblem@ 15 years ago with Continental General tires on Ford Bronco II vehicles (the AFirestone issue@). (July 16, 2001 letter from plaintiffs= counsel to Doug Robinson, counsel for Ford, attached as Exhibit C to Ford=s Petition for Writ of Prohibition and/or Mandamus).

Plaintiffs never sought written discovery on the Firestone issue. Further, the record demonstrates plaintiffs never sought depositions of other witnesses who have knowledge on the Firestone issue or a witness for the corporation itself on the Firestone issue. (August 7, 2001, transcript of hearing on Ford=s Motion for Protective Order and/or Motion to Quash, pp. 5, 12, 13 attached as Exhibit I to Ford=s Petition for Writ of Prohibition and/or Mandamus). Plaintiffs have made no efforts to obtain less intrusive discovery from Ford on the Firestone issue.

Respondent relied on plaintiffs= counsel=s statements that he reviewed prior Bronco II depositions. (August 7, 2001, transcript of hearing on Ford=s Motion for Protective Order and/or Motion to Quash, p. 27-8, 31, attached as Exhibit I to Ford=s Petition for Writ of Prohibition and/or Mandamus). Plaintiffs and Respondent referred to the Bronco II depositions contained on CD-Roms. However, these materials and depositions plaintiffs= counsel reviewed do not contain any testimony or information on the Firestone issue requested by plaintiffs. (August 7, 2001, transcript of hearing on Ford=s Motion for Protective Order and/or Motion to Quash, p. 29-30, attached as Exhibit I to Ford=s Petition for Writ of Prohibition and/or Mandamus). Accordingly, plaintiffs never attempted to obtain Firestone information from Ford through less burdensome means.

The Firestone litigation bears absolutely no relevance to plaintiffs= claims. Furthermore, Ford=s response to the Firestone tire situation is a well-documented matter of public record. The individuals at issue have been or will be deposed in the Ford/Firestone MDL proceeding, and although not relevant to this Bronco II case, Ford agreed to provide

plaintiffs a copy of the transcript of these Firestone depositions. Ford also agreed to produce a corporate representative on the Firestone issue. (Ford=s Reply Brief in Support of its Motion for Reconsideration, p. 2. attached as Exhibit L to Ford=s Petition for Writ of Prohibition and/or Mandamus). Therefore, less burdensome alternatives are available for plaintiffs to obtain the requested information.

D. Respondent abused her discretion and exceeded her jurisdiction because she did not require plaintiffs to first attempt to obtain the Firestone information through less burdensome means and because the record indicated the Aapex@ employees have no superior or unique knowledge on the Firestone issue

1. Respondent did not require any showing that plaintiffs attempted to obtain Firestone information through less intrusive means

Respondent never required any showing that plaintiffs attempted to obtain the Firestone information through less intrusive means. Plaintiffs have not conducted any written discovery on the Firestone issue. Moreover, the record indicates plaintiffs have not taken one deposition of a Ford employee or corporate designee on the Firestone issue, despite Ford=s offer to produce such witnesses. (August 7, 2001, transcript of hearing on Ford=s Motion for Protective Order and/or Motion to Quash, pp. 5, 12, 13 attached as Exhibit I to Ford=s Petition for Writ of Prohibition and/or Mandamus). Plaintiffs never attempted to

talk with Ford=s counsel about obtaining the Firestone information without the Aapex@ employee depositions.

The simple solution for this dispute is for plaintiffs to serve a proper Rule 57.03(b)(4) notice for deposition on the Firestone issue--a comparison between Ford=s conduct in the Firestone tire recall situation and an alleged ABronco II/GT52S problem@Band Ford will produce its corporate designees. Ford offered to produce Tim Davis, Quality Director North America, for such deposition on September 12, 2001, at 1:00 p.m. on the Firestone issue. Ford also offered to produce Ernest Grush, Corporate Technical Specialist-Environmental & Safety Engineering (also requested by plaintiffs), for deposition on September 13, 2001, at 9:00 a.m. on the Firestone issue. Reply to Plaintiffs= Suggestions in Opposition to Ford=s Motion for Reconsideration. (Attached as Exhibit L to Ford=s Petition for Writ of Prohibition and/or Mandamus). Plaintiffs never took advantage of Ford=s offer to provide depositions of these individuals on the Firestone issue. Respondent never required the less intrusive alternatives prior to the orders at issue in this case.

Several courts throughout the country have granted protective orders for deposition notices to Ford=s Aapex@ employees. These courts have granted protective orders because plaintiffs= counsel failed to obtain the information through less intrusive means and because the Aapex@ employees did not have superior or unique knowledge. Similar motions for protective order and/or motion to quash relative to the deposition of Aapex@ employees of Ford were sustained in the cases Hall, et. al. v. Ford Motor Co., et. al., pending in the State Court of Fulton County, State of Georgia, File No. 99FVS152700C and Collard, et. al.

v. Maier, et. al., pending in the 354th Judicial District of Texas, Case No. 58,942. (Hall Order, attached as Exhibit 1 of Exhibit J to Ford=s Petition for Writ of Prohibition and/or Mandamus) (Collard letter and Order, attached as Exhibit 2 of Exhibit J to Ford=s Petition for Writ of Prohibition and/or Mandamus).

A similar motion for protective order and/or motion to quash relative to the depositions of Mr. Nasser and Mr. John Lampe, CEO of Firestone, was sustained in Adams v. Ford Motor Co., et. al., No. 2,109 (Cir. Ct. 21st. Dist. Yazoo County, Miss. Oct. 23, 2000) (a copy of the Transcript of Motions Before the Court is attached as Exhibit L to Ford=s Petition for Writ of Prohibition and/or Mandamus). Adams involved an Explorer and Firestone tires, yet the Court refused to order the deposition of Mr. Nasser and Mr. Lampe without first requiring plaintiffs to explore less intrusive means:

> Okay. In that there=s been no 30(b)(6) deposition done with either of the defendants in this case, the Court finds that the plaintiff has not exhausted any less burdensome remedies to get this information or to determine if there is other people, other than the CEO, that can provide this information. Therefore, this Motion to Quash the deposition of Mr. Nasser, as well as Mr. Lampe, is granted.

(Exhibit A to Exhibit L at p. 14 attached to Ford=s Petition for Writ of Prohibition and/or Mandamus.)

A similar motion was also sustained in the case of Garza, et. al. v. Colburn, et al., pending in the State Court of Hays County, State of Texas, Cause No. 98-0189. (Transcript of Pre-Trial Hearing is attached as Exhibit L to Ford=s Petition for Writ of Prohibition and/or Mandamus). Garza also involved the Bronco II and Continental General Tire, Inc. The court in Garza granted the motion to quash Mr. Nasser=s deposition:

> Well, I think you=re entitled to take that discovery deposition [similarities of the claims rates between GT52S and Firestone tires], but it=s got to be of somebody in Ford that knows something. It seems to me that Ford has admitted that they have got somebody that probably knows something about tire separation and experience rating on these tires; and if they=ll give you that fellow for deposition . . . then I think they will have satisfied any legitimate needs that you have for information on Ford on the question of tires.

(Pre-Trial Hearing, Exhibit L at 56 attached to Ford=s Petition for Writ of Prohibition and/or Mandamus).[2]

2. The Garza Court also questioned the relevancy of the information plaintiffs are seeking in the present case even at the discovery stage: A[n]ow, to bring Nasser and his comments on TV, for instance, into this case is to - - really is to give you [plaintiffs] some kind of unfair advantage or unfair use of the Firestone climate in your work before a jury.@ (Exhibit L, p. 54, attached to Ford=s Petition for Writ of Prohibition and/or Mandamus).

Numerous courts throughout the country recognize the simplicity and efficiency of requiring plaintiffs to obtain information through less intrusive means. Respondent abused her discretion because she did not require any showing that plaintiffs attempted to obtain the Firestone information through less burdensome means.

2. Respondent did not require any showing that the Aapex@ employees have any superior or unique knowledge on the Firestone issue

Courts have consistently held superior or unique knowledge is a predicate to Aapex@ employee depositions. See, e.g., Liberty Mut. Ins. Co. v. Superior Court, 13 Cal. Rptr. 2d 363, 367 (Cal. Ct. App. 1992); In re Daisy Mfg. Co., 17 S.W.3d 654 (Tex. 2000). The application of this requirement balances the need for discovery with the cost and burden of deposing Aapex@ employees with limited or second-hand knowledge.

The record indicates plaintiffs never presented any evidence that Messrs. Nasser, Rintamaki, and Baughman have any superior or unique knowledge regarding the Firestone issue. Moreover, Respondent never required any showing that the requested deponents have any superior or unique knowledge on the Firestone issue - a comparison between two different situations separated by fifteen years. Messrs. Nasser, Rintamki, and Baughman each filed an affidavit demonstrating they have no personal knowledge of the plaintiffs= claims in this lawsuit. (Affidavits of Messrs. Nasser (Exhibit B to Exhibit E) Baughman (Exhibit F), and Rintamaki (Exhibit F) are attached to Ford=s Petition for Writ of Prohibition and/or Mandamus). In fact, Mr. Nasser=s affidavit demonstrates he was not even

involved in North American operations when the Bronco II was manufactured. Accordingly, Respondent abused her discretion by not requiring any showing that the Aapex@ employees have any superior or unique knowledge on the Firestone issue. See Binkley v. Palmer, 10 S.W.3d 166, 173 (Mo. Ct. App. 1999).

Plaintiffs= filings include several internet printouts purporting to contain statements made by Mr. Nasser regarding the general importance of safety at Ford Motor Company. Plaintiffs never included any statement from Mr. Nasser regarding the issue defined by plaintiffs. Mr. Nasser=s generalized statements on safety at Ford Motor Company do not establish he has unique or superior knowledge of the Firestone issue in this case. See In re Daisy Mfg. Co., Inc., 17 S.W.3d 654, 657 (Tex. 2000) (Texas Supreme Court upheld protective order of deposition notice of CEO regarding Daisy=s BB gun gravity-feed system despite CEO=s appearance on ABC News Program A20/20@. The Texas appeals court Aconcluded that a corporate official=s generalized opinion on the safety of one his company=s products >does not imbue that official with unique or superior knowledge.=@ (Id. quoting In re Daisy Mfg. Co., Inc., 976 S.W.2d 327, 329 (Tex. Ct. App. 1998))); Mulvey v. Chrysler Corp., 106 F.R.D. 364 (D.R.I. 1985) (denying deposition of Lee Iacocca despite his published biography allegedly containing Acertain damaging statements relevant to the defendant=s liability.@ Id. at 365).

E. The deposition of Relator=s Aapex@ employees are improper under Rule 56.01 because they are burdensome and will result in

significant disruption and cost compared to the marginal relevance of the discovery sought

The deposition of these individuals would also be improper on a variety of other grounds, including annoyance, harassment, and burdensomeness. Mo. R. Civ. P. 56.01(c). Ford is involved in thousands of lawsuits filed across the country each year. If Mr. Nasser were compelled to testify on irrelevant or tangential issues in even a small portion of these lawsuits, he would undoubtedly be forced to spend the remainder of his career in legal proceedings rather than guiding Ford=s global operation and overseeing its more than 350,000 employees. See, e.g., Fogelbach v. Dir. of Revenue, 731 S.W.2d 512, 513 (Mo. Ct. App. 1987) (noting the Director of Revenue would be required to appear at innumerable depositions is all parts of the state). Mr. Baughman and Mr. Rintamaki would also be required to spend the remainder of their career involved in legal proceedings. Ford=s Aapex@ employees should not be distracted from their management duties simply because plaintiffs want to start discovery at the top of Ford=s corporate structure.

The risks and costs of requiring Aapex@employees to take depositions without requiring discovery through less intrusive means and without a showing the Aapex@ employees have superior or unique knowledge of the requested information is significant. The costs to Aapex@ employees include lost opportunity costs, the inconvenience of appearing for the deposition, and the burden of scheduling sufficient time for counsel to prepare the Aapex@ employee for deposition. An Aapex@ employee=s time and exigencies of his/her everyday business would be severely impeded if every plaintiff filing a petition is

allowed to depose the Aapex@ employees. See, e.g., Union Sav. Bank v. Saxon, 209 F. Supp. 319, 319-20 (D.D.C. 1962).

Respondent=s construction of Missouri=s discovery rules essentially requires the deposition of Ford=s Aapex@ employees in any lawsuit, at any time involving Ford Motor Company. This construction is extraordinarily burdensome and unworkable to Aapex@ employees of all businesses operating in Missouri. Ford=s most senior executives were singled out by plaintiffs for deposition before any Ford or Continental General employee has been deposed. This constitutes an undue burden and demonstrates a clear strategy by plaintiffs to harass Ford.

F. Other courts throughout the country have limited Aapex@ depositions

ACourts in recent years have been fairly sympathetic to motions for protective orders filed by top corporate and government officials, because they realize that parties may seek to depose top officials merely to harass the other side or try to force a quick settlement.@ A. Darby Dickerson, Deposition Dilemmas: Vexatious Scheduling and Errata Sheets, 12 Geo. J. Legal Ethics 1, 44 (1998). ACourts realize that if they do not afford some protection to top officials, then those officials may spend a great part of the working day dealing with discovery, instead of their company=s or agency=s business.@ Id.

Federal and state courts addressing Aapex@ employee depositions consistently note the numerous courts recognizing the burdens and costs of Aapex@ employee depositions. AAs virtually every court which has addressed the subject has observed, depositions of

persons in the upper level management of corporations often involved in lawsuits present problems which should reasonably be accommodated in the discovery process.@ Crown Cent. Petroleum Corp. v. Garcia, 904 S.W.2d 125, 128 (Tex. 1995); See Sharma v. Lockheed Eng:g, Nos. 97-3134(L), 88-3055, 1988 WL 118154, at *3 (4th Cir. Nov. 7, 1988) (affirming protective order issued to prevent Lockheed:s president from appearing for his deposition where plaintiff had not deposed other lower-level Lockheed employees with personal knowledge of the lawsuit:s subject matter).

Numerous federal and state trial courts have recognized the potential for abuse by litigants in attempts to depose senior executives of their corporate adversaries. Senior corporate officers are Asingularly unique and important individual[s] who can be easily subjected to unwarranted harassment and abuse. [They have] a right to be protected, and the courts have a duty to recognize [their] vulnerability.@ Mulvey v. Chrysler Corp., 106 F.R.D. 364, 366 (D.R.I. 1995) (quashing deposition of Lee Iacocca, then Chairman of Chrysler).

1. Federal cases denying Aapex@ depositions

Several federal courts have denied depositions of Aapex@ employees because plaintiffs could obtain the requested information through less burdensome means and because plaintiffs made no showing that the Aapex@ employees have superior or unique knowledge about the requested information. For example, in Baine v. Gen. Motors Corp., 141 F.R.D. 332 (M.D. Ala. 1991), plaintiffs sought to depose a General Motors Vice President who authored a memorandum describing a prototype vehicle restraint system that became the subject of the lawsuit. General Motors opposed the deposition, arguing plaintiff

should first depose lower level employees with more direct knowledge before seeking the Vice President=s depositions. Id. at 334. The Court agreed, recognizing its authority to impose Arestrictions [on depositions] where the discovery sought >is obtainable from some other source that is more convenient, less burdensome, or less expensive.=@ Id. The court also ordered plaintiffs to propound interrogatories to GM and depose certain other lower-level GM employees before seeking the Vice President=s deposition. Id. at 336.

The Baine analysis requiring plaintiff to first exhaust less-burdensome means of discovery before seeking the deposition of GM=s senior corporate officer, and then show that the officer had Aunique personal knowledge@ before seeking his deposition, is consistent with the handling of similarly premature requests for Aapex@ depositions by other courts. See e.g., Hughes v. Gen. Motors Corp., 18 Fed. R. Serv. 2d (Callaghan) 1249, 1250 (S.D.N.Y. 1974) (quashing deposition of General Motors= president where A[n]o good cause exists to require defendant to submit its president for a deposition when it is clear that the information plaintiff wants is available through other employees . . . .@); Consol. Rail Corp. v. Primary Indus. Corp., No. 92 Civ. 4927 (PNL), 1993 WL 36447, at *2 (S.D.N.Y. Sept. 10, 1993) (Chairman/CEO and two Vice-Presidents of Conrail should not be deposed absent demonstration of unique knowledge, as Apermitting unfettered discovery of corporate executives would threaten disruption of their business and could serve as a potent tool for harassment in litigation.@); Thomas v. Int=l Bus. Mach., 48 F.3d 478, 482-84 (10th Cir. 1995) (upholding protective order barring the deposition of IBM=s Chairman where plaintiff failed to demonstrate that the information sought could not be gathered from other IBM personnel);

Lewelling v. Farmers Ins. Co., 879 F.2d 212, 218 (6th Cir. 1989) (affirming issuance of protective order prohibiting deposition of CEO who had no knowledge of plaintiffs= claims. The Court also sanctioned plaintiffs= counsel who was found to have exercised bad faith in trying to bargain the cancellation of the deposition for a settlement meeting); Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979) (vacated deposition notice of Upjohn=s president because plaintiffs failed to depose other more knowledgeable employees); Gazaway v. Makita USA, Inc., No. Civ. A. 97-2287-JWL, 1998 WL 219771 (D. Kan. April 16, 1998); Cantor v. Equitable Life Assurance Soc=y, No. CIV.A. 97-5711, 1998 WL 544962 (E.D. Pa. August 27, 1998); Alpex Computer Corp. v. Nintendo Co. Ltd., No. 86 Civ. 1749 (KMW), 1988 WL 87511 (S.D.N.Y. August 6, 1988); Digital Equip. Corp. v. Sys. Indus. Inc., 108 F.R.D. 742, 743 (D. Mass. 1987); Colonial Capital Co. v. Gen. Motors Corp., 29 F.R.D. 514 (D. Conn. 1961); Armstrong Cork Co. v. Niagara Mohawk Power Corp., 16 F.R.D. 389 (S.D.N.Y. 1954); M.A. Porazzi Co. v. The Mormaclark, 16 F.R.D. 383 (S.D.N.Y. 1951).

2. State cases denying Aapex@ depositions

State courts across the country routinely uphold protective orders for Aapex@ employees with no unique or superior knowledge and where plaintiffs have not sought discovery through less intrusive means. Crown Cent. Petroleum Corp. v. Garcia, 904 S.W.2d 125, 128 (Tex. 1995) set the standard for Aapex@ depositions in Texas. AUnder Crown Central, if a discovering party cannot show that a high-level official has unique or superior knowledge of discoverable information, the trial court must grant a motion for protection,

›and first require the party seeking the deposition to attempt to obtain the discovery through less intrusive means.=@ In re Daisy Mfg. Co., 17 S.W.3d 654, 656-7 (Tex. 2000) (quoting Crown Cent. Petroleum Corp. v. Garcia, 904 S.W.2d at 128). Texas Courts have consistently applied the Crown Central approach denying depositions of Aapex@employees. See, e.g., In re Alcatel USA Inc., 11 S.W.3d 173, 180 (Tex. 2000) (noting that many tort claims arise without the knowledge or involvement of an Aapex@ employee); In re El Paso Healthcare Sys., 969 S.W.2d 68, 72-5 (Tex. App. 1998); Frozen Food Express Indus., Inc. v. Goodwin, 921 S.W.2d 547 (Tex. App. 1996); and AMR Corp. v. Enlow, 926 S.W.2d 640 (Tex. App. 1996).

Similarly, the California Appeals Court in Liberty Mut. Ins. Co. v. Superior Court, 13 Cal. Rptr. 2d 363, 367 (Cal. Ct. App. 1992), quashed the deposition of a senior executive in the absence of a showing that the executive had Asuperior personal knowledge of discoverable information.@ The Court stated, A[v]ast numbers of personal injury claims could result in the deposition of the president of a national or international company whose product was somehow involved. It would be unreasonable to permit a plaintiff to begin discovery by deposing, for instance, the chief executive officer of a major automobile manufacturer when suing over a design flaw in a brake shoe . . .@ Id. at 366.

Furthermore, in Broadband Communications Inc. v. Home Box Office, Inc., 549 N.Y.S.2d 402 (N.Y. App. Div. 1990), the New York Appeals Court upheld a protective order striking plaintiff=s notice to depose the defendant=s chief executive officer. See, e.g., Arendt v. Gen. Elec. Co., 704 N.Y.S.2d 346 (N.Y. App. Div. 2000).

Courts have consistently required plaintiffs seeking Aapex@ employee depositions to first attempt to obtain the requested information through less burdensome means, then demonstrate the Aapex@ employee has superior or unique knowledge about the requested discovery. The policy reasons are clear. The alternative is the improper use of discovery as a mechanism for harassment and a tactic to seek sanctions, which is inapposite to the purpose of discovery in Missouri.

CONCLUSION

Respondent abused her discretion because she did not require any showing that plaintiffs attempted to obtain Firestone information through less burdensome means and Respondent did not require any showing that the Aapex@ employees have any superior or unique knowledge on the Firestone issue. For the reasons set forth herein, Relator Ford Motor Company prays the Court to make final its Writ of Prohibition and/or Mandamus prohibiting Respondent from taking further action on her August 3, 2001, Order, and August 17, 2001, Order and requiring Respondent to vacate these Orders.

CERTIFICATE REQUIRED BY SPECIAL RULE NO. 1(C)

The undersigned does hereby certify that this brief complies with Special Rule No. 1(b), and contains 6,023 words. The undersigned further certifies that a floppy disk containing Relator=s Brief was filed with this brief in compliance with Special Rule No. 1(f), and that the disk is virus free.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify, pursuant to Special Rule No. 1, that (1) a hard copy of the foregoing document in the form specified by Special Rule No. 1(a) and (2) and a copy of the disk required by Special Rule No. 1(f), was sent via Federal Express, this 19th of October, 2001, to the individuals below. The undersigned does also hereby certify that the disk required by Special Rule No. 1(f) is virus-free.

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